In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3935

S. L. SELIG, AS CLAIMANT OF THE GAS POWER BOAT "EAGLE," HER ENGINE, APPAREL, TACKLE AND FURNITURE, AND J. R. HECKKMAN, STIPULATOR,
APPELLANTS

VS.

MARY L. BRINDLE, AS EXECUTRIX OF THE ESTATE OF ALEXANDER BRINDLE, DECEASED,
APPELLEE

Petition for Rehearing

WINTER S. MARTIN
PROCTOR FOR APPELLANTS
2014 L. C. SMITH BUILDING, SEATTLE, WASHINGTON

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3935

S. L. SELIG, AS CLAIMANT OF THE GAS POWER BOAT "EAGLE," HER ENGINE, APPAREL, TACKLE AND FURNITURE, AND J. R. HECKKMAN, STIPULATOR, APPELLANTS

VS.

MARY L. BRINDLE, AS EXECUTRIX OF THE ESTATE OF ALEXANDER BRINDLE, DECEASED, APPELLEE

Petition for Rehearing

To the Honorable Judges of the Circuit Court of Appeals for the Ninth Circuit:

The petition of appellants for rehearing in the above enttiled cause, respectfully sets forth and shows:

POINT I

A Vessel Violating One of the Collision Rules, viz., the Failure to Keep a Proper Look-Out is Presumed to Be at Fault and Must Exonerate Herself.

In the opinion it is said that:

"It is well settled that the absence of a look-out is not material where the presence of one would not have availed to prevent a collision."

and in keeping with this thought this court has decided that the absence of a look-out made no particular difference in the case at bar. We believe that the court is in error upon the facts for the reason, first, that the evidence discloses that if the master of the "Wildwood" had been looking, he could have seen the "Eagle" long before he did in fact see her. Note this question at page 16 of the brief:

"Q. Yes, but with a moon, now, nearly full and half way up on the horizon, clear night, not obscured, you could see the outline of the 'Eagle' on the water some distance away, couldn't you?

"A. *If I had been looking over my port bow and watching closely I might have seen it.*"

This with the physical fact that the light-keeper and his wife heard the "Eagle" and observed her

off on the water when she was a half a mile distant or more from the place where the "Wildwood" must have been, indicates clearly that the failure to keep the kind of look-out required by law on the part of the "Wildwood" had as much to do with the collision as the corresponding negligence on the part of the "Eagle" in running without lights. How can this court say that her failure to keep a look-out did not contribute to the result in view of the admission of the "Wildwood's" master? He could have seen that there was a vessel and that it was moving towards him. Can this situation be distinguished from the one in the case of Eastern Dredging Company v. Winnisimmet Company, 162 Fed. 860. In that case in the lower court, the learned judge thought that although the failure to keep a look-out might have been a fault,

"he did not regard it as an efficient contributing fault. On the other hand, we think that this lack of a proper look-out was a very grave fault, and that the fault did contribute to the collision. The supreme court has been constantly rigid in holding vessels to maintaining look-outs as far forward and as near the water as possible. Especially where the water is dark, with otherwise a fairly clear night, it is important that the look-out should be as near it as possible, in order that his eye may follow

the surface, and thus be in position to detect anything low down which may be approaching. While it may be true that there was no occasion to anticipate that a mud scow would be adrift in the harbor, without lights and without being manned, at that time of the night, various very small crafts, including even rowboats, were to be guarded against as a matter of reasonable and ordinary precaution."

In that case the Circuit Court of Appeals for the first circuit divided the damages, holding that the failure to keep a look-out was a very grave breach of duty, which placed a *prima facie* burden of fault upon the other vessel. We quote as follows from that case:

"Beginning as early as The Genesee Chief, 12 How. 443, 463, 13 L. Ed. 1058, which was followed by a continuous line of decisions to the same effect, the supreme court observed as follows:

" 'Whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault.'

"This, of course, means the fault of the steamer. Applying this rule to this case, it does not seem to be necessary to go further; but, again, in The Ariadne, 13 Wall. 475, 478, 20 L. Ed. 542, the opin-

ion of the court referring to the waters near the city of New York, spoke of them as being at all times crowded with shipping, and added:

" 'The greatest care and caution are necessary. The duty of the look-out is of the highest importance. Upon nothing else does the safety of those concerned so much depend.'

"Again, referring to the attitude of the look-out, the opinion says, on page 479 of 13 Wall. (20 L. Ed. 542):

" 'Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated, until she vindicates herself by testimony conclusive to the contrary.'

"These expressions of the supreme court, which under the circumstances render the ferryboat *prima facie* guilty of contributory fault in this case, are in harmony with the views which all of us entertain, namely, that the lack of a look-out on the main deck was a grave fault, and that, with such a look-out, the scow would probably have been seen in season to have avoided her, so that it was a contributory fault in a positive and efficient manner. Therefore we are of the opinion that the damages and costs in the district court should be divided."

The United States Supreme Court has said that violation of the collision rules creates a *prima facie* case of fault on the part of each of the vessels vio-

lating the rule. In the Pennsylvania, 19 Wall. 125, the supreme court said:

" 'The liability for damages is upon the ship or ships whose fault causes the injury; but when, as in this case a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisons it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been.*'

"This rule applies where a proper look-out is not provided:

The Geo. W. Childs, 67 Fed. 272.
McCabe v. Old Dom. S. S. Co., 31 Fed. 234.
The Lyndhurst, 92 Fed. 681.
The Beaver, 197 Fed. 866.
The Welburt L. Smith, 217 Fed. 984."

In a situation of this sort is not the burden upon the "Wildwood" to show that her failure to keep a look-out could not have contributed to the collision which immediately followed? The gist of the court's opinion in the case at bar is that because the fault of the "Eagle" was clearly established, the burden of showing that the "Wildwood"

was at fault, falls upon the owners of the "Eagle," whereas quite the contrary appears to be the rule in a case where there has been a violation of one of the collision rules. Violation of the rules creates a case of presumed fault which shifts the burden to the violator, requiring him to show that his violation could not have affected the result. In the case at bar the court disregards this principle, and places the burden of showing that the "Wildwood's" failure to keep a look-out, was actually a contributing cause upon the "Eagle" instead of requiring the "Wildwood" to show that her own failure to keep a look-out could not have affected the result. In the Eastern Dredging case, the Circuit Court of Appeals for the First Circuit has followed our reasoning in this case, whereas this court in the instant case rejects this reasoning, and places the burden where it does not belong. So placed, quite a different conclusion follows. The "Wildwood" viewed as a violator of one of the collision rules with the presumption against her, can not under the disclosed facts, show that her failure to keep a look-out did not contribute. On the other hand if no such presumption follows, then the "Eagle" must show that the "Wildwood's" failure did in fact materially affect the final result. If such is the

correct rule of law, it may be that because the fault of the "Eagle" was clearly established that one may speculate upon the result and say that perhaps it would have made no difference, even if the "Wildwood" did not keep a look-out. We respectfully urge that the court in its opinion has not passed upon the question presented in our opening brief in this case.

POINT II

Apportionment of Costs

Upon this point we respectfully urge that the costs should be divided and properly apportioned in view of the record and the efforts on the part of the appellant to minimize the costs of printing on this appeal. We call the court's attention to the appellants' designation to the clerk directing him to print only those parts of the record which touch the question of navigation and mutual fault, expressly deleting those portions of the record pertaining to the amount or allowance of damages. See the printed record at page 300, *et seq.* The court will note at page 301 that appellant relied entirely upon the errors relating to collision liability expressly waiving any errors touching the amount or extent of

the damage award. In other words we were content to accept as the total damages of the case the findings of the district court, to-wit, $2,006.80. In view of this statement of errors, which we intended to rely upon, we expressly directed the clerk not to print a great deal of the testimony in the case. Respondent, however, was not willing to accept the award of the trial court, but upon the contrary directed the clerk to print at length a great deal of testimony touching the matter of damages. Note appellee's designation at page 307 of the printed record. Inasmuch as the court has not increased the damage award, in its opinion recently filed, we respectfully urge that the appellee should be compelled to pay for that part of the record which she caused to be printed unnecessarily. We refer this court to subdivision 8 of Rule 23 of the General Rules for the Ninth Circuit. We quote particularly the following from subdivision 8 on page 21, to-wit:

"If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clery shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error

or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed such order as to costs may be made as the court shall think proper."

We also call the court's attention to subdivision 5 of Admiralty Rule 4 of this court, viz:

"and so much of the testimony taken in the proceeding as may be necessary to a review of the exceptions."

Also section 2:

"All other papers shall be omitted unless otherwise ordered by the judge who heard the cause."

Section 3:

"Where the appellant shall appeal specially and seek only to review one or more questions involved in the cause, the apostles may, by stipulation between the proctors for the respective parties, contain only such papers and proceedings and evidence as are necessary to review the questions raised by the appeal."

These rules are in harmony with Rule 49 of the Revised Rules of the United States Supreme Court, which regulate the contents of the Admiralty record on appeal. The whole purpose of these rules is to prevent the printing of voluminous records not

material to the issue and not necessary for a consideration of the points relied upon in the Appellate Court. We respectfully urge that the printed record in this case is at least 50 per cent larger than it would othewise have been if appellee had been content to accept the damage award of the trial court. Note the following:

Testimony of Alexander Brindle, pages 42-52, both and all inclusive.

Testimony of A. J. Inman, pages 52-74, both and all inclusive.

Testimony of George Thompson, page 74 to the top of page 87, both and all inclusive.

Testimony of A. J. Inman, pages 157-159, both and all inclusive.

Testimony of Carrington C. Keesling, pages 161-179, both and all inclusive.

Testimony of Joseph F. Radenbaugh, pages 182-194, both and all inclusive.

Testimony of James Rasmussen, page 194 to the top of page 204, both and all inclusive.

Testimony of Alexander Brindle, pages 204-205.

Testimony of Carrington C. Keesling, pages 272-273.

Designation by appellee for printing record, pages 307-310, both and all inclusive.

In addition to the extra and unnecessary printed matter in the record, appellee has devoted pages 43 to 50 of his brief to a discussion of the question of damages. The part relating to interest is covered in one paragraph on page 50. The remaining part of appellee's brief was entirely unnecessary. We respectfully urge that this court upon rehearing direct the clerk to properly apportion the cost of printing in this case, to the end that the appellant may be relieved of the burden of unnecessarily printing the parts of the record, which appellee unnecessarily directed the clerk to print.

WHEREFORE your petitioner prays that your honors will grant a rehearing in said cause, and after due consideration reverse the decision heretofore entered and enter a decree dividing the damages in said cause and will apportion the payment of costs as prayed for herein.

WINTER S. MARTIN,
Proctor for Appellants.

CERTIFICATE OF COUNSEL
Under Rule 29

I hereby certify that the foregoing petition for rehearing is in my judgment well-founded, and that it is not interposed for delay. This certificate is for the purpose of complying with Rule 29.

WINTER S. MARTIN,
Proctor for Appellants.